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Date: June 27, 1995

Case No.: 93-DBA-89

In the Matter of:

Disputes concerning the
payment of prevailing wages
for the classification of work
performed, the concealment of
payroll and time records, sub-
mission of falsified certified
payroll records to contracting
agency and Wage & Hour Division
of the United States Department
of Labor, and Proposed debarment
ment for labor violations by

DERBES BROTHERS, INC.,
GENERAL CONTRACTOR,
Toffee Derbes, President
Richard Derbes, Vice President
Franklin Derbes, Clerk/General Mgr.
Robert Derbes, Treasurer

With respect to Class II Heavy
and Highway Laborers (Asphalt
Rakers, Pneumatic Tool Operators)
employed by the General Contractor
under the Davis-Bacon Act and the
Housing & Community Development
Act of 1974, CONTRACT NO. 93-79,
involving the Quincy Center
Improvements Phase II, Contract #2
Project

APPEARANCES:

On behalf of the Solicitor:

Gail E. Glick, Esq.
U.S. Department of Labor
Office of the Solicitor
One Congress Street, 11th flr.
Boston, MA 02114

On behalf of the Regional Solicitor:

Karin J. Froom, Esq.
U.S. Department of Labor

Office of the Regional Solicitor
One Congress Street, 11th flr.
Boston, MA 02114

On behalf of the Respondent:

John D. O'Reilly, III, Esq.
O'Reilly and Grasso
77 Turnpike Road
Southborough, Massachusetts, 01772-2110

BEFORE:

Joel F. Gardiner
Administrative Law Judge

DECISION AND ORDER

This matter was referred to the Office of Administrative Law Judges for determination under the procedures mandated under Reorganization Plan No. 14 of 1950 (64 Stat. 1267), Section 110 of the Housing and Community Development Act of 1974 (42 U.S.C. 5310) and the applicable regulations promulgated pursuant to the Davis-Bacon Related Acts, 29 C.F.R. Part 5, Sections 5.1(a)(46), 5.11(b) and 5.12(a). The initial Order of Reference was issued on September 14, 1993. A Notice of Hearing was issued by Judge Rosenzweig on June 22, 1994, setting a hearing date of August 23, 1994. On August 4,1994, Judge Rosenzweig issued a Pre-hearing Order. On August 19, 1994, Judge Rosenzweig issued a Notice of Re-Scheduled Hearing and Pre-Hearing Order which postponed the Hearing until November 1, 1994. On September 1, 1994 this case was reassigned to the undersigned.

A hearing was held on November 1 and 2, 1994, in Boston Massachusetts. At the hearing Administrative Law Judge's exhibits 1 through 13, Solicitor's exhibit's A through O, and Respondents' exhibits 1 through 5 were admitted into evidence.[1] Subsequent to the hearing both parties filed briefs.[2] This decision is rendered after full consideration of the entire record herein.

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[1] "ALJX" refers to the Administrative Law Judge's exhibits, "PX" refers to the Solicitors exhibits (the exhibits are designated as PX as they were referred to as Plaintiff's exhibits at the hearing), "RX" refers to the Respondent's exhibits, and "TR" refers to the official transcript of this proceeding.

[2] These briefs are hereby received as Solicitor's exhibit P and Respondent's exhibit 6 respectively.

BACKGROUND

This case involves various alleged violations which occurred in connection with the Quincy Center Improvement Phase II Project (hereinafter the Quincy Center Project).

In the late 1950's, several members of the Derbes families began a small paving business which eventually developed into corporations called Derbes Bros. Construction Co. Inc. and Derbco Automotive (hereinafter referred to as the Respondents)[3] to engage in the construction business. On June 26, 1992, Derbes Bros., Inc. was awarded a contract by the City of Quincy, Massachusetts to pave various roads and install sidewalks in downtown Quincy. The Solicitor alleges, in sum, that during the course of this project, Respondents falsified certain payroll records and attempted to conceal payroll records from the Department of Labor investigator and that these acts, along with the Respondents' history of two prior violations warrant the debarment of the Respondents from federally funded projects for three years.

Respondents began as a small landscaping company in 1957. (TR 224) The Respondents gradually began performing paving projects and increased their employee complement. By 1970, Derbes Bros. Inc. had signed collective bargaining agreements with Local 133 of the Laborers International Union of North America (hereinafter Laborers Local 133) and Local 4 of the International Union of Operating Engineers (hereinafter Operating Engineers Local 4).[4] (TR 231-232)

In the 1980's, Respondents began to perform public works projects. In 1982, Respondents were audited by the Department of Labor (hereinafter DOL) for alleged Wage & Hour and Davis-Bacon violations, including allegations that employees were not properly paid for work on Saturdays. Respondents agreed to reimburse employees a total of $469 and $915 to settle these charges. (TR 191)

Respondents continued to expand to the point where they were able to undertake both public works contracts and non-governmental,

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[3] Although the Solicitor's complaint specifically names Derbes Bros., Inc., Toffee Derbes, Richard Derbes, Franklin Derbes, and Robert Derbes, the allegations include the records of Derbco and the activities of the Derbes brothers in running both corporations. Therefore I have included all of the named individuals and both corporations when referring to the Respondents.

[4] These collective bargaining agreements did not cover the employees of Derbco.

commercial work at the same time. Although being a signatory to two union contracts, Respondents were able to enter into an arrangement with both Laborers Local 133 and Operating Engineers Local 4, which allowed them to operate as a "double breasted" company. This in effect meant that when working on all public or union work the employees were paid union wages and benefits. However, when working on private, non-governmental or commercial work, the employees received a lower rate of pay and did not receive payment or credit for union health and welfare benefits.[5] From time to time, the unions would audit the Respondents' payroll records to ensure that all public, i.e., union work was being paid at the union rate and that payments were being made to the appropriate union health and welfare funds. According to the Respondents, at some point in the 1980's the union auditors suggested that the Employer, in order to avoid any confusion, use a separate, non-union payroll for all private work. The auditors explained that any and all work reported on the union payroll required the payment of union wages and benefits. The Respondents agreed and proceeded to record all public work and/or union work on the Derbes Bros. payroll and all private, non-union work on the Derbco Inc. payroll.[6] (TR 238-239) The union representatives who testified stated that it is common practice in the construction industry to operate "double breasted," that employees are often transferred between jobs during the day and that the union in effect "looked the other way." (TR 314-315,322-323,327-331) At the time of the hearing, Respondents had approximately 20 employees on the Derbes Bros. payroll who were seasonal and 5 employees on the Derbco payroll who worked the entire year. (TR 231)

In November 1988, a second DOL investigation of Respondents took place. The investigator was Richard Daley. Mr. Daley, the DOL Assistant District Director, testified that he had been a DOL investigator from 1975 to 1990. The 1988 investigation covered the period from 1986 to 1988. It was alleged that the Respondents had violated the Fair Labor Standards Act and the Davis Bacon Related Acts by falsifying payroll records and failing to properly pay overtime and the prevailing wage. The investigation focused on the practice of requiring employees to report to the shop by 7:00 a.m. The employees were then allowed to have coffee and prepare for the work day, but did not begin being paid until they boarded Respondent's trucks at 7:30 a.m. According to the investigator,

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[5] This proceeding and decision does not concern the legality of this arrangement or any possible violations within the provisions of the National Labor Relations Act, 29 U.S.C. §151 et seq.

[6] The record is not clear as to what the Derbco payroll was used for prior to this time or to what extent subsequent to this time Derbco had its own employees who were not engaged in the paving business.

Respondents were in violation of the Fair Labor Standards Act and the Davis Bacon Act. He testified that Respondents had two separate payroll records, one of which dealt only with cash disbursements. Respondents paid a total of $16,200 to settle these charges. According to the investigator, during a conference with the Respondents they were told that "debarment was a possibility." (TR 183-189)[7]

FACTS

In 1992, Respondents were awarded the contract for the paving and sidewalk work on the Quincy Center Project. The value of the initial contract was approximately $700,000 but this was increased to $1,300,000. (TR 228) Work on this job commenced on July 20, 1992 and was completed by October 10, 1992. (TR 264, 310) Some of the work on this project involved the erection of brick flower containers. Respondent assigned this work to its employees who were members of Laborers Local 133. During the course of this project, a person identifying himself as a business agent for the Bricklayers Union approached the Respondents and demanded that the brick work on the Quincy Center Project be assigned to members of the bricklayers' union. The Respondents refused this demand. According to the Respondents and Laborers Local 133, the business agent stated that he would file complaints with the City of Quincy and the Federal Government to have the Respondents debarred from this type of work. (TR 240-241, 333, RX1)

In November 1992, Joyce Noonan, a compliance officer for DOL, Wage & Hour Division, contacted the Respondents. She went to Respondents' location on Branch Street, Quincy. She met with Frank Derbes, the general manager, and Cindy Ohlson, the bookkeeper. Ms. Noonan testified as to her memory of the investigation.[8] She asked "if the firm had been working on any federally funded projects" between 1990 and 1992. (TR 33) Frank Derbes responded that they had not. Ms. Noonan then asked "directly about the Hanover Street project." Respondents stated they had worked on this project and supplied the payroll and time records for Derbes Bros., and the certified payrolls for the Quincy Center Project. (PX D and E, TR 33) Ms. Noonan was allowed to review and transcribe these

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[7] Mr. Daley was also the supervisor for the 1992 investigation discussed infra. He testified that if he had conducted the 1992 investigation he would first have asked Respondents how many companies or corporations they had and then would have asked for all the records for all these companies. (TR 205-206)

[8] According to Ms. Noonan, her office had received a complaint from the United States Department of Housing and Urban Development (hereinafter HUD). In turn, HUD had received a complaint from the City of Quincy. (TR 70-71)

documents.[9] (PX F) She was also allowed to return to Respondents' location on November 16, 1992, to interview four employees during work time, which Ms. Noonan described as standard procedure. (TR 37-38,67) She had compared the employees' time sheets (PX C) and the individual Derbes Bros. pay cards (PX D) with the certified payroll for the Quincy Center Project (PX E). The time sheets showed the employees working more hours than were recorded on the certified payroll. Specifically, two employees had 40 hours for one week on their time sheets but only 20 hours on the certified payroll. (RE 39-41) After interviewing these employees and computing the hours listed on the payroll, Ms. Noonan concluded that the complaints which her office had received about the Quincy Center Project were valid.

Ms. Noonan met with Frank Derbes and Cindy Ohlson again on or about December 7, 1992. (TR 41) Ms. Noonan described the discrepancies she had found. According to Ms. Noonan, Respondents' representative said there could have been an error and then left the room. A short time later Robert Derbes, Respondents' Treasurer, telephoned Frank Derbes and said that the employees in question had been paid on the Derbco, the private payroll. (TR 42) Ms. Noonan stated at this time that she had previously asked for "all the records for the last two years." According to Ms. Noonan, Frank Derbes said he was unaware of the second set of records. (TR 43) Ms. Noonan was then given and was allowed to photocopy the Derbco payroll. (TR 43, PX G)

Respondents' version of this investigation was given by Robert and Frank Derbes and Cindy Ohlson, Respondents' secretary and bookkeeper. Respondents' witnesses testified that it was their goal to cooperate completely in the investigation. (TR 251-252,351) Ms. Ohlson testified that the DOL investigator asked for the 1990-1992 Derbes Bros. payroll. It was only when the investigator referred to discrepancies that the Respondents' offered the Derbco payroll to show how the other hours had been recorded. (TR 344-347, 355) Frank Derbes, Respondents' general clerk, testified that the DOL investigator said she wanted to see the Derbes Bros. payroll at the initial meeting and only requested the Derbco records at a subsequent meeting. (TR 411-412) Frank Derbes added that this was consistent with his understanding of the genesis of the investigation which was a complaint by the

[9] Respondents offered evidence that Derbco had been in existence for a number of years. Respondents had several signs including a large one over the entrance to their facility which stated "DERBES BROS. DERBCO AUTOMOTIVE" (RX 4A,4B, TR 65-66,244) However, Ms. Noonan testified that she was unaware of Derbco when she began the investigation and did not learn of its existence until approximately December 7, 1992. (TR 64,94) Ms. Noonan also testified that she was unaware of the practice in the construction industry of operating as a "double breasted" entity. (TR 89)

bricklayers' union about assignment of work on the Quincy Center Project. (TR 429) Robert Derbes testified that the DOL investigator initially asked for "the certified payrolls on the Quincy II job" and did not refer to anything concerning Derbco. (TR 248-249)

Respondents stated that their employees who did the paving work on the Quincy Center Project were paid on the Derbes Bros. payroll for all work on that project. However, the same employees were assigned to other work during this period. Employees would frequently work several hours at the Center and then work on a private non-union jobs during the same work day. Employees' hours for the non-union, private work were recorded on the Derbco payroll. Employees on the Quincy Center project would also perform work which was not covered by the prevailing rate, such as guarding sidewalks after the work day to prevent vandalism. This work was also recorded on the Derbco payroll. (TR 274,361-362,404-409) The DOL investigator testified she was unsure whether such "guard duty" would be covered by the prevailing rate. (TR 86-87)

After her initial interviews with employees, the DOL investigator did not meet again with employees during the investigation. Thus, she was not able to verify the performance of guard work or whether these employees had worked on private jobs during the same period they were working on the Quincy Center Project. Ms. Noonan explained that during the initial interviews they indicated they just worked on the Quincy Center Project. (TR 87, 104-106)

At the final conference with Respondents' representatives on December 10, 1992, Ms. Noonan outlined the violations she had found including the fact that the Derbco payroll records had not been supplied "initially." (TR 59) According to Ms. Noonan, Robert Derbes explained that this was because Respondents believed she had been "honing in only on the federal project." (TR 60) Ms. Noonan responded that she had requested "all pay and time records for the last two years." (TR 60) At the conclusion of this conference, Respondents' representatives agreed to comply with all the provisions of the Fair Labor Standards Act[10] and the Davis-Bacon Act. Respondents also agreed to pay all back wages which were due.[11] Ms. Noonan recalled telling Respondents' representatives that there was a "possibility of debarment." (TR 62)

On cross examination, Ms. Noonan stated that when she first went to Respondents' place of business she requested the payrolls

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[10] The Fair Labor Standards Act violations which had been found totaled $50. (TR 70)

[11] All money which was due to employees pursuant to this investigation was paid shortly after the final conference.

for all "federally funded projects," or "the Quincy Center project." (TR 74) Respondents reportedly answered that they did not "have any federal projects." (TR 75) Later Ms. Noonan testified that she asked for "all of the pay and time records for all employees over a two year period." (TR 77-78,91-92)

Subsequent to the final meeting with Respondents, Frank Derbes called Ms. Noonan and informed her that the City of Quincy was withholding approximately $250,000 owed to Respondents, pending the outcome of the DOL investigation. Ms. Noonan then called the City of Quincy, informed them that the back wages had been paid, and shortly thereafter, the $250,000 was paid to the Respondents. (TR 79-80, 261-262)[12]

Noel Codling testified that he was employed off and on by Respondents from 1989 to 1992. (TR 117) He worked on the Quincy Center Project for about two months but was uncertain as to when this was during 1992. (TR 117) He testified that at least one other employee, Robert Scott, was assigned to watch sidewalks while they were drying to prevent vandalism. (TR 135) Codling was never assigned to do this. (TR 118-119) He testified that he worked eight hours, 7:30 a.m. to 3:30 p.m., five days a week for the entire time he was on this project. (TR 120-121) According to Mr. Codling, he worked forty hours every week unless it rained. (TR 122) He testified that payroll records which showed that he worked only twenty hours a week on this project were inaccurate. (TR 123-129) He stated he never worked at the "shop" or at "Green Street." (TR 130-133, 170)

On cross examination, Codling testified he started working at the Quincy Center Project in May 1992. (TR 141) He could not name any of the streets on this project. (TR 144,146,151) He testified he worked on this project in June 1992, eight hours a day, five days a week. (TR 147-148) He stated he remained on this job until December 1992 when he was laid off. (TR 150-151) Also on cross examination he stated he did not know if other employees were assigned to watch the cement. (TR 153-154,171) He testified he was paid $15 an hour and worked 40 hours a week. (TR 175) Thus his gross pay would be $600 a week. He testified he did not receive union health and welfare benefits, although he had

[12] John Comer, the executive director of the Quincy Housing Authority, testified that he had overseen approximately twelve to fifteen public works contracts performed by Respondents for the City of Quincy. His department is responsible for seeing that the posted rate is paid on City construction projects. There had been no complaints filed against Respondents on any of these projects. Mr. Comer testified that, in his opinion, Respondents were one of the finest contractors in the City. Mr. Comer had no direct knowledge of the hours of work or the wages paid on the Quincy Center Project. (TR 108-116)

"cleared" his working on the Quincy Center Project with Laborers Local 133. (TR 155) He did, however receive pay stubs which showed the amount he was paid and what his deductions were. (TR 160-161) The Respondents" bookkeeper testified that at least on one occasion she showed him that he was receiving two separate paychecks and that at the end of the year he received two W-2 tax statements. (TR 394-395) He testified that he did not know what the union rate was or whether he was receiving it. (TR 165-166) He assumed that the rate was $15 per hour and he would therefore be paid $600 for a 40 hour week.

Paul J. McNally, the Business Agent for the Massachusetts Laborers District Council, testified that he had been involved in the construction industry in Massachusetts for more than fifty years. He stated that it is not unusual for a paving contractor to use the same crew to work on different jobs during the same day. Laborers Local 133 was in his District Council and he was responsible for processing any grievances filed against Respondents. Mr. McNally was unaware of any such grievance since Respondents had become signatory to the Laborers contract in the late 1970's. (TR 328-329) He testified that he was aware that union contractors engaged in "double breasting" and that the union was essentially willing to "look the other way." (TR 330-331) Similarly, when union members act as watchmen while cement is drying, the collective bargaining agreement did not apply and members were free to strike their own deal. (TR 332)

POSITIONS OF THE PARTIES

Solicitor's Position

Respondents paid employees wages lower than the prevailing rate and understated the number of hours actually worked on the Quincy Center project. In order to conceal these violations Respondents maintained two sets of books and attempted to hide the existence of the second set of books from the DOL investigator. These actions, in conjunction with Respondents' history of two prior violations amount to willful and aggravated violations of the Davis-Bacon Related Acts and require debarment from such contracts for a period of three years.

Aggravated and willful violations are intentional, deliberate and knowing violations and not mere inadvertence and negligence. See McLaughlin v. Richland Shoe Corp., 486 U.S. 128 (1988), A. Vento Construction, CCH LLR WH Ad. Rulings, 31,987 (October 17, 1990).

Falsification of certified payroll records to conceal violations constitutes aggravated and willful violations and warrant an order imposing a three-year debarment period. R.J. Sanders, Inc., WAB No. 90-25 (January 31, 1991); A. Vento

Construction, supra, Stateline Roofing Co., CCH LLR WH Ad. Rulings, ¶32,251 at 44,646-44,647 (April 23, 1993); H. P. Connor and Company et. al., CCH LLR WH Ad. Rulings, ¶32,044 at pp. 43,850-43,851 (February 26, 1991).

Employer's Position

The Solicitor failed to sustain his burden of proof. There is no factual basis for the assertion that the Employer did not pay the prevailing wage rate for all hours worked on the Quincy Center Project. The Employer had legitimate, lawful business reasons for recording employees hours on two different payrolls. The Employer cooperated fully in the DOL investigation and did not attempt to conceal the existence of a second set of books. The employee witness, Codling, is not credible. The 1982 and 1988 DOL investigations did not warrant consideration for debarment at the time and may not now be utilized to support debarment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The first issue presented concerns the alleged violations uncovered by the 1992 DOL investigation concerning nonpayment of prevailing wages. The Solicitor relies on two bases to prove these allegations - the records themselves and employee testimony.

The records, in and of themselves, do no more than establish some inconsistences. The Solicitor relies on the fact that Respondents submitted eleven weeks of certified payroll records for the Quincy Center Project. During eight of the eleven weeks four employees worked an average of four hours a day, twenty hours a week on the project. (CX E) The Solicitor argues that these records are internally inconsistent and lack credibility. First, the Solicitor points to the Derbco time sheets which contain only three entries under "location." "Quincy Shop," "Green Street" and "Weymouth Garage" are the only locations cited. (PX G) The Solicitor takes the position that this shows the records are falsified. Robert Derbes' only explanation was that the term "shop" could refer to anything including work at a non-prevailing rate job. However, the Derbes Bros. time sheets for the period July 24 through October 9, 1992, the period encompassed by the investigation, refer to a number of other locations. (PX C) The bookkeeper testified that the only prevailing wage rate work was that designated as "Hancock Street" and that every other entry was considered to be private, non-prevailing wage rate work. (TR 370-374) Respondents did introduce photographs which Robert Derbes testified showed Mr. Codling working at a job in Cambridge, Massachusetts on August 5, 1992, during the time Mr. Codling testified he was working exclusively on the Quincy Center Project. (TR 266-269, 292-295) Mr. Codling was not recalled to testify with respect to these photographs.

The Solicitor also points to the fact that when Noel Codling first began working in April, 1992, it is undisputed that he was doing private, non-union work. The Solicitor cites Respondents' payroll records which show Codling at this time was on the Derbes Bros., the union payroll, but for some unexplained reason was receiving $15 an hour, the non-union rate. (PX D) The Solicitor argues that this obvious contradiction also shows that the payroll records are unreliable. However, the bookkeeper explained that Mr. Codling was placed on the Derbes Bros. payroll because he needed a sufficient number of hours to be eligible for the union fringe benefits. As previously noted, all hours on the Derbes Bros. payroll required that Respondents make the appropriate payments to the union health and welfare funds. Finally, the bookkeeper also explained that while an entry on the Derbes Bros. payroll required payments for the union health and welfare funds it did not require payment of the prevailing rate. As Ms. Ohlson stated, it was her understanding that the prevailing rate was limited to projects like Quincy Center. (TR 397-399, 440-441)

The Solicitor's final argument with respect to the payroll records concerns the certified payroll for the Quincy Center Project. For the first two weeks, the laborers' rate is shown as $16.90. In the third week an "adjustment" of $6.00 an hour was made. Beginning with the third week, the laborers rate is shown as $22.90. (PX E) The Solicitor argues, in effect, that the records should show the rate as $16.90 and a $6.00 per hour payment to the appropriate union for health and welfare benefits. Other records establish that the employees were given, and cashed, paychecks which were based on an hourly rate of $22.90. (PX I) The Solicitor argues that if these records are accepted as accurate, they would show that Respondents included the $6.00 per hour in the employees paychecks and then made a second $6.00 per hour payment to the union for health and welfare benefits. According to the Solicitor, it is "highly unlikely" that Respondents would make such a double payment and therefore the payroll records are unreliable. Respondents' bookkeeper stated that the "adjustment" was made because she was told by the City of Quincy that the $16.90 rate was incorrect. The documents introduced show that employees did in fact receive payment based on this rate. Therefore, it appears that Respondents were indeed paying the incorrect rate, albeit one that favored the employees by $6.00 an hour. However, I do not find that this is a persuasive reason, in and of itself, to question the validity of these records. This Project was for a fairly short period of time and the bookkeeper testified credibly that she was acting on instructions from the City.

In conclusion, while there are questions and inconsistencies in the payroll records, I find that there is no basis to disregard these records or conclude that they were fabricated to hide any violations concerning payment of the prevailing wage rate.

The Solicitor's case then, in effect, hangs on the credibility of Mr. Codling to establish that the records are inaccurate and were compiled to conceal violations. Mr. Codling testified that he worked on the Quincy Center Project for eight hours a day, five days a week for the entire term of the Project. According to Mr. Codling, the only exceptions were when it rained or there was a holiday. (TR 122-128)

Mr. Codling's testimony was at times inconsistent and was contradicted at a number of points by other exhibits. Mr. Codling evidenced confusion as to when he actually worked on the Project. He first testified that he did not remember the month he began work on the Project, but recalled he was on this job for about two months. (TR 117) On cross examination, he testified repeatedly that he began working on the Project in May, 1992 and continued to do so until December 1992. (TR 141-142,147,149-151) On redirect examination, he testified he did not begin work on the Quincy Center Project until "spring break" or June. (TR 168) He testified that he was working on the Quincy Center Project at the time he spoke to the DOL investigator. (TR 169) The parties agree the Respondents began work on the Quincy Center Project on July 20, 1992 and completed work by October 10, 1992. The 1992 DOL investigation did not commence until November 1992. Thus, Mr. Codling was in error with respect to when he started and finished and how long he had, in fact, worked on this job.[13]

Mr. Codling also appeared somewhat confused with respect to his pay and benefits. He testified very clearly that he understood his rate of pay to be $15 an hour. (TR 175) This was below the union contract and the prevailing rate. Mr. Codling stated that although he checked with the Laborers Local 133 before taking the job with Respondents in 1992 (TR 162), he felt he was able to negotiate his own hourly rate even on union or public work projects. This is unusual testimony from a person who had been a union member for a number of years. Further, if Mr. Codling did indeed work solely on the Quincy Center Project and if he was paid $15 and hour without benefits, his pay would only vary each week when there was a holiday or time was missed due to rain. The payroll records show that his gross and net pay varied substantially from week to week. Both Mr. Codling and Ms. Ohlson testified that Mr. Codling always checked his pay carefully. (TR 154,393-394) Mr. Codling testified he was paid the correct hourly wage on the Quincy Center Project but did not receive any union fringe benefits on this job. The records show that in fact he was credited for purposes of union health and welfare benefits for all hours recorded as working on this Project. Mr. Codling also testified that he received an annual statement from Laborers Local

[13] Mr. Codling had, in fact, returned to work for the respondents on April 17,1992, but worked on other jobs before being assigned to the Quincy Center Project. (PX D)

133 which listed the hours he had worked during the year. On cross examination, he stated he was covered by the union medical insurance and pension plan. (TR 165-166)

These statements demonstrate that with respect to the Quincy Center Project, Mr. Codling was not aware of the dates of his employment, his rate of pay, or the fact that he received credit for union health and welfare benefits. Moreover, although a Union member for a number of years, he felt he was able to negotiate his hourly rate on his own. He demonstrated poor memory with respect to fairly obvious details, i.e., he was unable to name any streets on the Quincy Center Project and did not remember that at least on one occasion he received two separate pay checks and separate W-2 tax statements at the end of the year. In view of all of the above, I am not persuaded that Mr. Codling is a reliable witness with respect to the details of where and when he worked on the Quincy Center Project. Accordingly, I find that the Solicitor has not sustained his burden of establishing that the Respondents violated the Davis-Bacon Related Acts.

Further, assuming that the Secretary had established that the employees had not been paid the prevailing rate and overtime, the total violations amounted to $2,761.42 due to four employees. The contract for the Quincy Center Project in its final form exceeded $1,300,000. Thus, the violations were .002% of the total contract. The cases have held that such an amount is to be considered de minimis. See e.g., Action Systems, Inc., et. al., 82-SCA-81, 85-SCA-15, 86-SCA-37 (January 25, 1991).

Moreover, even assuming there were violations of the Davis-Bacon Related Acts, I do not find that Respondents engaged in concealment of the payroll records involved. In effect, the Solicitor urges that at the commencement of the investigation the DOL agent asked for all payroll records for all of Respondents' businesses for the prior two years and that Respondents deliberately and knowingly withheld the Derbco records to conceal the violations. I find that the investigator made at best an unclear and at worst an inaccurate request for the payroll records. I do not mean to imply that the investigator was anything less than forthright in her testimony. I found her to be an open and honest witness who gave her best recollection of the events in question. However, the investigator was unfamiliar with the practice of "double breasting" and did not know of the existence of Derbco at the outset of the investigation. In these circumstances, it is understandable that she would not make precise, inclusive requests with respect to payroll records. The investigator herself gives several different versions of exactly what it was she asked for. Initially she asked for "any federally funded projects" and then about "the Hancock Street project." She said she would "need the contract information and the certified payrolls for that project." (TR 33) The investigator testified that it is her usual procedure to ask for all time records for all employees for the past two

years, but did not testify that she had made that specific request in the instant case. In any event, she was given the Derbes Bros. payroll and the time cards of the employees who worked on the project. Although the matter is not entirely clear, it is understandable how Respondents could think they were complying with the specific requests of the investigator.

This was the third time DOL had investigated Respondents. During the second investigation there was an issue of two sets of books and the investigator at that time had mentioned the possibility of debarment. The prior investigator said it would have been his procedure to ask about all the Respondents corporations and then to ask for all these payroll records. Respondents' witnesses give a dramatically different version of these events. They stated in effect that they did everything possible to cooperate in the investigation and it was they who referred to the Derbco payroll as an explanation for the "missing" hours.

Although the matter is not entirely free from doubt, I find that the Solicitor has not sustained his burden of proof by showing that the Respondents knowingly and deliberately withheld and/or concealed payroll records. The investigator's request was imprecise, or at least open to the interpretation that Respondents gave to a request pertaining to the Hancock Street job or federally funded projects. I find it difficult to understand why, in a third investigation when the issue of a second set of payroll records had previously arisen, there was no written request for the specific documents sought by the DOL. I am not speaking necessarily of a subpoena, but merely a letter or memo to Respondents. Having failed to do this, and having presented a witness who testified to several slightly different versions of what was requested, I find that the Solicitor has not carried his burden of establishing intentional concealment. Moreover, assuming arguendo that there was an attempt to withhold records pursuant to a feigned "misunderstanding" of the investigator's request, when the alleged discrepancies were pointed out to the Respondents, the investigator was supplied with and allowed to copy all of the Derbco records. This arguable delay during the course of the investigation would not, in and of itself, warrant debarment.

The cases cited by the Solicitor, e.g., R.J. Reynolds, Inc. and A. Vento Construction, do not require a different result. These cases found that the employer had kept two separate books for the purposes of concealment. In effect, the employer kept a set of deliberately inaccurate payroll records to show any DOL investigators and a second, accurate set of records which reflected the actual wages paid to employees. In the instant case, we are dealing with the records of two separate corporations, one union and one non-union, each of which accurately reflects the wages paid by that corporation.

Finally, the Secretary does not rely on the instant case alone to support the requested debarment of Respondents but points to a history of two prior "violations," in 1982 and 1988. With respect to the 1982 investigation, no evidence was submitted to establish any violation. With respect to the alleged 1988 violations Richard Daley, the supervisor of the 1992 investigation and the investigator in 1988, testified as to his findings during the 1988 investigation. The 1988 case was, as discussed supra, resolved by the payment of $16,200. There was no litigation of the underlying allegations. While I find no fault with the accuracy of Mr. Daly's testimony as to his recollection of what the investigation "found" this is not sufficient to establish a prior violation. Absent a prior decision, the Solicitor must introduce in the instant proceeding the same quantum of proof to establish the existence of a violation. The testimony of the investigator as to what he recalled finding will not suffice.

For all of the above reasons, I find and conclude that the Solicitor has failed to carry his burden of proving that the Respondents have engaged in violations of a sufficiently egregious nature to warrant disbarment.

ORDER

The Secretary's request for an order that the Respondents be debarred is hereby DENIED and the complaint herein DISMISSED.

JOEL F. GARDINER
Administrative Law Judge

Boston, Massachusetts

JFG:gcb